Supreme Court, U.S.
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No. 09-675

In The Supreme Court of the United States

COUNTY OF BUTTE, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF BUTTE COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

BRIEF OF *AMICI CURIAE* FOR CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION, CALIFORNIA POLICE OFFICERS' ASSOCIATION, CITY OF COSTA MESA, AND CITY OF WHITTIER IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

MARTIN J. MAYER
Counsel of Record
KRISTA MACNEVIN JEE
JONES & MAYER
3777 North Harbor Boulevard
Fullerton, California 92835
(714) 446-1400
Counsel for Amici Curiae and/or City Attorney

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, which defines marijuana as contraband per se, preempt the decision from California's Third District Court of Appeal, which held that California law provides a protected property interest in marijuana that can form the basis for a civil action against law enforcement officers for money damages?

PARTIES TO THE PROCEEDING

The Petitioners are the County of Butte, California, the Butte County Sheriff's Department, and Butte County Sheriff's Deputy Jacob Hancock.

The Respondents are the Superior Court of Butte County, David Williams, and Does 1-4.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Amici Curiae respectfully submit this *Amici Curiae* brief in support of Petitioners' Petition for Writ of Certiorari to urge the Court to grant such Petition. *Amici* are the California State Sheriffs' Association (CSSA), the California Police Chiefs' Association (CPCA), the California Peace Officers' Association (CPOA), the City of Costa Mesa and the City of Whittier. Counsel of Record's firm is the City Attorney, and authorized law officer, of the City *Amici*. No motion for leave to file the within *Amici Curiae* brief or disclosure of monetary contribution, therefore, are required pursuant to this Court's Rules. Sup. Ct. R. 37.4.[1]

CSSA represents each of the fifty-eight (58) elected California Sheriffs. CPCA represents virtually all of California's Municipal Chiefs of Police. CPOA represents more than four thousand peace officers, of all rank, throughout the State.

I. STATEMENT OF BASIS FOR JURISDICTION AND STATEMENT OF CASE

Amici Curiae adopt and incorporate by reference the statement by Petitioners of the basis for this

[1] Notwithstanding this, the Butte County Superior Court granted consent for this brief by *Amici* by order dated January 8, 2010.

Court's jurisdiction in this matter, as well as Petitioners' Statement of the Case. (*See* Petition for Writ of Certiorari at 1-12).

II. REASONS FOR ALLOWING WRIT OF CERTIORARI

In accordance with this Court's Rules, this Court may properly grant the Petition for Writ of Certiorari in this matter. The California Court of Appeal Opinion below recognizes property rights in medical marijuana in the State of California, which is in direct contradiction of federal law. Therefore, the granting of the Petition for Writ of Certiorari herein is necessary in order to settle important issues of federal law and to ensure that state law decisions do not conflict with decisions of this Court. Sup. Ct. R. 10(c).

Amici intend to briefly highlight, but not unduly repeat, important legal issues in this matter which are already included in the full text of the *Amici Curiae* brief previously submitted to the Court of Appeal and considered as part of its decision, which brief is included in the Appendix to the Petition for Writ of Certiorari. (*See* Petition for Writ of Certiorari, Appendix D).

III. INTRODUCTION

The California Court of Appeal in this matter has opined in a published opinion applicable throughout

the State of California that an individual possessing, cultivating, transporting or distributing marijuana for medical purposes, in compliance with California law, may maintain a cause of action against law enforcement agencies or officers because the individual can show that he or she legally was entitled to such marijuana. (*See* Petition for Writ of Certiorari, Appendix B at 11a (*County of Butte v. Superior Court*, 175 Cal. App. 4th 729, 736, 96 Cal. Rptr. 3d 421, 427 (2009))).

The Court agreed with a prior decision by another district of the California Court of Appeal in *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656 (2007), wherein the Court of Appeal had recognized that an individual can be "legally entitled to possess" medical marijuana. (Petition for Writ of Certiorari, Appendix B at 11a (*County of Butte*, at 736, 96 Cal. Rptr. 3d at 427 (*citing City of Garden Grove*, 157 Cal. App. 4th at 389))). Such conclusions are a direct affront to federal law.

IV. MARIJUANA IS CONTRABAND AND ILLEGAL UNDER BOTH STATE AND FEDERAL LAW.

This Court determined in *Gonzales v. Raich*, 545 U.S. 1, 26-7, 125 S. Ct. 2195, 2211, 162 L. Ed. 2d 1, 25 (2005), that the federal government, pursuant to the Controlled Substances Act ("CSA"), had determined that marijuana is "contraband for *any* purpose."

(emphasis in original). In fact, the CSA specifically permits States to *also* regulate controlled substances, but *only* to the extent that such regulations do not involve "a positive conflict" between a State's regulations and the CSA "so that the two cannot consistently stand together." 21 U.S.C. § 903.

This Court in *Gonzales v. Raich* has already established that there is precisely such a conflict between state laws that permit medicinal use of marijuana and federal laws, which prohibit *any* medical use and, in fact prohibit virtually *all* uses of marijuana.

As Justice Morrison rightly asserted in his dissent, "[c]ontraband *per se* consists of objects which are intrinsically illegal in character, the possession of which, without more, constitutes a crime. . . . Courts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession." (Petition for Writ of Certiorari, Appendix B, at 22a-23a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 742, 96 Cal. Rptr. 3d at 432, *dissenting opinion* (*citing Cooper v. City of Greenwood, Miss.* 904 F.2d 302, 304-05 (5th Cir. 1990); *U.S. v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008)))).

Notably, even California law still recognizes that the possession, cultivation, and distribution of marijuana is a *crime*. The Compassionate Use Act (Cal. Health & Saf. Code § 11356.2, the "CUA") and the Medical Marijuana Program Act (Cal. Health &

Saf. Code §§ 11362.7-11362.83, the "MMPA") merely provide for a limited *defense* against prosecution of such crimes under certain circumstances. *See, e.g.*, Cal. Health & Saf. Code § 11362.765 (prohibiting criminal liability from being imposed for the possession, planting, harvesting, processing, transportation, and certain manufacturing and distribution of marijuana for medical purposes under specified circumstances); *Chavez v. Superior Court*, 123 Cal. App. 4th 104, 110, 20 Cal. Rptr. 3d 21, 25 (2004) (patient can "raise the medical use defense to set aside an information, indictment, or as a defense at trial"); *Ross v. Ragingwire Telecommunications*, 42 Cal. 4th at 923, 174 P.3d 200, 202, 70 Cal. Rptr. 3d 382, 385 (2008) (CUA provides a "defense to certain state criminal charges").

Therefore, under both California and federal law, marijuana cannot be "legally" possessed, and, as such there can be no enforceable property right in *any* marijuana. As recognized in the dissenting opinion, "the CUA did not give 'marijuana the same status as any legal prescription drug.'" (Petition for Writ of Certiorari, Appendix B, at 21a (*quoting Ross*, at 926, 174 P.3d at 204, 70 Cal. Rptr. 3d at 387)).

The dissenting opinion focuses on the very heart of the matter presented to this Court, namely that "[t]he marijuana was not 'legal' under state law, because California cannot make 'legal' that which Congress makes illegal." (Petition for Writ of Certiorari, Appendix B, at 21a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 742, 96 Cal. Rptr. 3d at

431, *dissenting opinion* (*citing City of Garden Grove*, 157 Cal. App. 4th at 377, 68 Cal. Rptr. 3d at 670))).

V. THE RECOGNITION BY CALIFORNIA OF A PROPERTY RIGHT IN MEDICAL MARIJUANA CONFLICTS WITH FEDERAL LAW AND PRIOR DECISIONS OF THIS COURT.

This Court has held that the CSA has a purpose of "control[ling] the *legitimate and* illegitimate traffic in controlled substances." *Gonzalez v. Raich*, 545 U.S. at 12, 125 S. Ct. at 2203, 162 L. Ed. 2d at 15 (emphasis added). In *Gonzalez v. Raich*, this Court noted that "Congress was particularly concerned with the need to prevent the *diversion* of drugs from legitimate to illicit channels." *Id.* (emphasis added). Therefore, the Court concluded that in enacting the CSA, "Congress devised a *closed* regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* (emphasis added).

It is this very "closed" regulatory system which has imposed a controlling and preemptive characterization as to the nature of marijuana. California State law cannot modify this characterization, even though it may be permitted to determine that State prosecutorial resources will not be used to combat certain uses of marijuana.

While this Court has not said that state refusal to criminalize or prosecute marijuana offenses is somehow contrary to federal law, the Court of Appeal's opinion in this matter goes well beyond mere inaction on the part of the State of California. The Court of Appeal's opinion in this matter affirmatively establishes a legally recognized, sanctioned and enforceable *right* to marijuana which cannot "consistently stand" with federal law.

Although not directly at issue on the facts in this matter, both the CUA and the MMPA fundamentally undermine the goals of the CSA as to the stated purposes and goals of the Act. 21 U.S.C. § 801. More specific to the issues in this matter, however, the Court of Appeal opinion creates a specific and irreconcilable conflict between state and federal law. In fact, the Court of Appeal's opinion below makes a flat mockery of federal law.

As set forth in the *Amicus Curiae* brief by *Amici* in the Court of Appeal below, which is included in the Appendix to the Petition for Writ of Certiorari, a close analogy exists as to the issues proposed by Respondent David Williams' complaint against the County of Butte with respect to marijuana and the nature of counterfeit money. (*See* Petition for Writ of Certiorari, Appendix D at 63a). No one would legitimately propose that an individual could retain a legally cognizable property right in counterfeit money, *even if* the State of California had legislatively determined that it did not want to, itself, pursue

prosecution as to such matters. The same is equally true of marijuana.

Items such as counterfeit money and marijuana are characterized as wholly illegally. Accordingly, allowing such materials to be recognized as "property," and returning such items to individuals allows such items to be in general circulation. These actions directly interfere with Congress' ability to regulate such materials, and to achieve its goal of eradicating the very existence of such materials or preventing the diversion of such materials to illegal usage.

As this Court has specifically recognized with respect to marijuana, Congress has already determined that there is *no* accepted or medical use of marijuana, and Congress has exercised its legitimate exclusive authority to regulate such matters by way of the CSA. *Gonzalez v. Raich*, at 28 ("the fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.").

A property interest simply cannot be recognized by State law, since Congress has definitely determined that *all* marijuana is contraband per se and there can be no property interest in such *illegal* substance. 21 U.S.C. §§ 881(a)(1) ("no property right shall exist" in controlled substances "manufactured, distributed, dispensed, or acquired in violation of" the CSA); 881(f)(1) (schedule I drugs, such as

marijuana, "deemed contraband")[2]; *Gonzalez v. Raich*, at 26-7 (marijuana is "contraband for any purpose").

Even the California Supreme Court has recognized that "[n]o state law could completely *legalize* marijuana for medical purposes because the drug remains illegal under federal law even for medical purposes." *Ross v. Ragingwire Telecommunications*, 42 Cal. 4th at 926, 174 P.3d at 204, 70 Cal. Rptr. 3d at 387 (2008) (emphasis added). The recognition of a California State property right is inimical to federal law.

VI. THE COURT OF APPEAL'S OPINION ENCOURAGES DISREGARD AND VIOLATION OF FEDERAL LAW AND INTERFERES WITH THE ABILITY OF STATE AND LOCAL GOVERNMENT TO ASSIST FEDERAL AUTHORITIES.

Most critical to this Court's consideration of this matter is the practical impact that the Court of Appeal's decision will have not only on law enforcement personnel and agencies, but on the general existence and proliferation of marijuana within and outside the State of California. As noted by Petitioner, state law enforcement officials take an oath to uphold

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[2] Notably, California law has not changed the characterization of marijuana as a Schedule I drug under the California Uniform Controlled Substances Act, for which there is no legally permitted use. Cal. Health & Saf. Code §§ 11054(d)(3) & 11007.

the Federal Constitution and federal laws and often jointly work with federal authorities on drug enforcement. (Petition for Writ of Certiorari, at 15-16). (*See also* Petition for Writ of Certiorari, Appendix at 18a-19a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 740-1, 96 Cal. Rptr. 3d at 430, *dissenting opinion*)). The Court of Appeal's opinion in this matter goes further than any other California court has previously done to actually coerce state and local law enforcement officials into *not* upholding, furthering or honoring federal law, upon threat of liability.

The Court of Appeal has put the backing of the entire State judicial system, the very force of law, behind medical marijuana growers, distributors and users; it is no longer merely a matter of the State of California *refraining* from prosecuting marijuana violators. For instance, if a local law enforcement officer were acting jointly with a federal task force to confiscate marijuana, such officer would have to be certain that no possible claim of medical marijuana entitlement could be made as to such marijuana, or else his or her agency, and even the officer him or herself *individually*, could be held liable for damages to such marijuana, or damages to its "owner" flowing therefrom, which could be caused by that officer – whether directly or indirectly, whether accidentally or

purposefully, or whether at the direction of federal authorities.[3]

Local law enforcement officers would be relegated to the mere shadows in such joint enforcement action, or else have to forego cooperating or assisting federal authorities altogether, in order to avoid the specter of liability which has now been created by the Court of Appeal. This hypothetical scenario only serves to emphasize the fact that the Court of Appeal's opinion in this matter directly inhibits the very goals and purposes Congress had in enacting the CSA, in regulating both the legitimate and illegitimate uses of all marijuana, for all purposes, in all states. *Gonzalez v. Raich*, 545 U.S. at 30, 125 S. Ct. at 2213, 162 L. Ed. 2d at 27 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected. Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just 'plausible' . . , it is readily apparent.").

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[3] The Court will note that, although the underlying complaint in this matter is not presently before the Court, Respondent David Williams has sought exemplary and punitive damages individually against Butte County Sheriff's Deputy, Jacob Hancock.

As the dissenting opinion recognizes, "[i]mposing civil liability for an officer who complies with federal law will lead to further confusion surrounding medical marijuana. Judges take the same oath, and the court should not encourage illegal acts." (Petition for Writ of Certiorari, Appendix at 19a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 741, 96 Cal. Rptr. 3d at 430, *dissenting opinion*)).

VII. THE COURT OF APPEAL'S RECOGNITION OF A PROPERTY RIGHT IN MEDICAL MARIJUANA DIRECTLY CONFLICTS WITH FEDERAL LAW.

The most basic problem with the recognition of a property right in medical marijuana is the fact that both the State of California, and Congress by the CSA, characterize marijuana as a Schedule I drug. There is, statutorily stated, no accepted medical use for marijuana, and virtually all private possession, cultivation, use and distribution is statutorily stated to be *illegal*. 21 U.S.C. § 812; Cal. Health & Saf. Code §§ 11054(d)(3) & 11007.

Simply, there can be no violation of rights, no compensation, no wrong associated with such an *illegal* substance. Furthermore, to allow the recognition of any such right interferes with and undermines the comprehensive federal authority which Congress has exercised in the enactment of the CSA. 21 U.S.C. § 801; *Gonzalez v. Raich*, at 12-13.

Moreover, to recognize a property right in such illegal, highly regulated material, is to open the door to recognizable property rights with respect to *all* regulated substances under the CSA. If states can grant rights in, and permit the use, possession, cultivation and distribution of, marijuana, there is no prohibition to the very same action being taken as to *any and all* schedule I drugs. Such possible action merely highlights the absurdity of the Court of Appeal's opinion in the face of federal law, and demonstrates the complete erosion of the CSA and Congress' authority which the Court of Appeal's opinion presents, if it is permitted to stand.

VIII. CONCLUSION.

Many of the issues implicated by the Court of Appeal opinion in this matter require the detailed analysis that only substantive briefs on the merits can adequately address. Suffice it to say that *Amici* feel that the impact of the Court of Appeal's opinion in this matter is of significant importance to the day-to-day activities of the law enforcement officers who are members of *Amici*, as well as the multitude of law enforcement officer employees over whom *Amici* members have supervisory authority.

In fact, the matters at issue herein are of nationwide importance. In particular, as the dissenting opinion noted, there are twelve other states with statutes permitting medical marijuana (*see* Petition for Writ of Certiorari, Appendix B, at 19a n.1 (*County*

of Butte v. Superior Court, 175 Cal. App. 4th at 740 n.1, 96 Cal. Rptr. 3d at 430 n.1, *dissenting opinion*)), and those states as well as others are likely looking to California as an example of how this experiment in a contradiction of federal and state law will conclude.

Thoughtful direction from this Court is most urgently needed on the issues presented. The Court of Appeal's opinion recognizes a property right in medical marijuana within the State of California, which permits growers, cultivators and distributors of medical marijuana within the State, to directly, publicly and with the backing of legal authority, flout federal law and the authority of Congress under the CSA.

The matters put in issue by the Court of Appeal opinion are of extreme importance to the scope, interpretation and enforcement of federal law. *Amici*, therefore, join Petitioners in emphatically requesting this Court to grant review in this matter, so that the parties, and *Amici*, may substantively address these

issues in more detail to the Court, and a resolution of the presented conflicts in law can be finally reached.

Respectfully submitted,

MARTIN J. MAYER
Counsel of Record
KRISTA MACNEVIN JEE
JONES & MAYER
3777 North Harbor Boulevard
Fullerton, California 92835
(714) 446-1400
Counsel for Amici Curiae and/or City Attorney for California State Sheriffs' Association, California Police Chiefs' Association, California Police Officers' Association, City of Costa Mesa, and City of Whittier